1968

The State of Utah v. Lawrence Mack Holt : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

LAWRENCE MACK HOLT,
Defendant-Appellant.

Case No. 10772

BRIEF OF RESPONDENT

**Appeal from the Judgment of the Third District Court,
Salt Lake County
Honorable Aldon J. Anderson, presiding**

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BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Lawrence Mack Holt, appeals from a jury verdict of first degree murder with recommendation of leniency.

DISPOSITION IN THE LOWER COURT

The appellant was charged with murder in the first degree. A jury trial was held and the jury returned

a verdict of guilty with a recommendation of leniency. The Honorable Aldon J. Anderson imposed sentence on appellant of life imprisonment.

RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the Third District Court should be affirmed.

STATEMENT OF FACTS

On July 14, 1966, Bernice King was shot to death in the roadway behind Clark's Cafeteria, located at 33rd South and State Street in Salt Lake County. Deputy Sheriff Barr Peterson arrived at the scene at about 9:02 p.m. (R.187) Present at his arrival were the deceased and Richard L. Allen. Allen testified that he and the deceased were shot by appellant (R.367) The cause of death of Bernice King was the bullet wounds to the brain. (R.218)

On the day of the shooting appellant talked to Mary Lou Lemon three times, trying to get a date with her. (R.349) In the third conversation with her at about 6:00 p.m. appellant said he was going to get even with a few people before 10:00 p.m. that night: one was a person who had hurt him and another was one he used to go with. (R.350) After deliberating for at least three hours and with malice aforethought, appellant wilfully and deliberately put the gun up to

the deceased's head and shot her. He next shot Richard Allen and then shot Bernice King again between the eyes at point blank range. Prior to the shooting, appellant had been lying in wait near and about the rear of the cafeteria. (R.297-298)

After the shooting appellant fled to the Clayburn residence. Doyle Clayburn, a fifteen year old boy, testified that Holt arrived and seemed upset. Upon inquiry appellant admitted that he had shot a woman. (R.272) The boy testified that he had observed appellant for possible drunkenness and that appellant did not appear to be drunk. (R.275) Appellant while at the Clayburn home telephoned Helen Virginia Smith, who testified that appellant stated he had shot the deceased two times and killed her. (R.332-333)

Subsequently appellant fled to Brigham City. He later returned to Salt Lake City, where after speaking with a friend, he voluntarily turned himself over to the law enforcement officers.

ARGUMENT

POINT I

THE JURY IS NOT BOUND BY EXPERT TESTIMONY, EVEN THOUGH UNREBUTTED; THEY CAN ACCEPT IT, REJECT IT, OR GIVE IT WHATEVER WEIGHT THEY SEE FIT ESPECIALLY WHEN DE-

FENDANT'S OWN ACTIONS OR THE FACTS THEMSELVES BELIE SUCH OPINION.

In *Commonwealth v. Carroll,* 442 Pa. 525, 194 A.2d 911 (1963), the defendant was convicted of first degree murder. In that case the psychiatrist's opinion was that the defendant's state of mind due to rage and desperation made it legally impossible for him to premeditate the crime. The jury, however, came to the opposite conclusion, resulting in his conviction for murder in the first degree. On appeal the Pennsylvania Supreme Court held:

> "A psychiatrist's opinion of a defendant's impulse or lack of intent or state of mind is, in this class of case, entitled to very little weight, and this is especially so when defendant's own actions, or his testimony or confession, *or the facts themselves, belie the opinion.*" 194 A.2d at 917 (Emphasis added).

In *Commonwealth v. Woodhouse,* 401 Pa. 242, 164 A.2d 98 (1960), the defendant was convicted of first degree murder for killing an adopted daughter. The defense introduced testimony of three psychiatrists who had examined the defendant. They testified that the defendant suffered from a severe psychosis or insanity. The lower court's instruction to the jury, as to the weight to be given expert medical opinion, was declared to be an accurate statement of the law, wherein it stated:

> You must consider their (psychiatrists) training, qualifications and experience . . . it must be kept in mind that an opinion is only an opinion.

> It creates no fact. Because of this, opinion evidence is considered of a low grade and not entitled to much weigh against positive testimony of actual facts such as statements by the defendant and observations of his actions. 164 A.2d at 107.

This is relevant to the case at bar inasmuch as appellant was examined some three months after the act, as was the defendant in *Woodhouse*, thus giving appellant considerable time for thought, as well as time to rationalize his position. In spite of this, the most Dr. Moench could testify to was that as far as appellant's knowledge of right and wrong and awareness of the nature of his act was concerned, it was "seriously impaired" (R.397) The appellant's ability to control these, however, was not extinct.

This testimony, which is not even absolute as to appellant's insanity, could be weighed and rejected by the jury in lieu of the facts and circumstances of the case. Respondent would submit that appellant's conversation with Mary Lou Lemon some three hours prior to the shooting to the effect that appellant was going to get even with a few people before 10:00 p.m. that night, securing a gun, loading it, lying in wait for the deceased and her friend, knowing he had fired three shots, knowing and telling friends that he had shot the deceased and her boy friend, could all be considered by the jury. The jury could, within the bounds of its discretionary powers, reject the psychiatrist's opinion or give it little weight as against the existing positive facts of the case.

POINT II

THE TRIAL COURT RULED CORRECTLY IN DENYING APPELLANT'S MOTION FOR PRETRIAL AND TRIAL INSPECTION OF WRITTEN STATEMENTS OF WITNESSES.

The defense filed a motion for a bill of particulars. This was answered by the prosecuting attorney except for the question in which the defense asked for any written statements of any of the witnesses obtained in the investigation of the charge. The prosecutor refused to answer this question and the defense claimed they were entitled to an answer by virtue of Utah Code Ann. § 77-21-9 (1953). The court in *State v. Lack,* 118 Utah 128, 221 P.2d 852 (1950), interpreting the statute held that a bill of particulars was not available as a discovery device:

> Sec. 105-21-9, U.C.A. 1943, (Sec. 77-21-9, U.C.A. 1953) was designed to enable a defendant to have stated the particulars of the charge which he must meet, where the short form of indictment or information is used. It was not intended as a device to compel the prosecution to give an accused person a preview of the evidence on which the state relies to sustain the charge.

The information sought by the defense is therefore beyond the scope of a bill of particulars under Utah state law and the trial court was correct in denying appellant's motion.

Further respondent would argue that liberal discovery in criminal cases should not be allowed. Reasons

for this proposition and constructive instructions concerning solution of the problem are contained in *State v. Tune,* 13 N.J. 203, 98 A.2d 881 (1953). This instructive opinion has been accepted by the Utah Supreme Court most recently in *State v. Martinez,* 21 Utah 2d ...., ... P2d .... (1968).

POINT III

QUESTIONS NOT RAISED AND PRESERVED AT TRIAL CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

In *State v. Braley,* 224 Or. 1, 355 P.2d 467 (1960), a homicide prosecution, the court held that where an instruction as to intoxication as a defense was not requested and no exception was taken for the failure of the court to give it, the question could not be raised and considered on appeal. The court held this in lieu of the harmlessness of the error, inasmuch as the evidence establishing defendant's intoxication was not strong. The court stated:

> . . . a question not raised and preserved in the trial court will not be considered on appeal . . . the rule is applicable in criminal as well as civil cases . . . and it applies even though the defendant was tried for the commission of a capital crime. 355 P.2d at 471.

In *State v. Abel,* 241 Or. 465, 406 P.2d 902 (1965), the defendant appealed from a judgment of conviction of the crime of forgery. The defendant's brief contained

twelve assignments of error, only two of which wer based on objections or requests for rulings properl and timely made by counsel at the trial. Defendan argued that the appellate court was required to revie the alleged errors to guarantee due process to the ac cused. The court held:

> . . . notwithstanding recent decisions of th courts manifesting a high degree of sensitivit to claimed violations of the constitutional right of persons accused of crime, it is still the rul in this state in criminal as in civil cases that question not raised and preserved in the tria court will not be considered on appeal. 406 P.2 at 903.

This court agrees. *State v. Starlight Club*, 17 Utah 2d 174, 406 P.2d 912 (1965).

Appellant urges that the trial court erred in per- mitting testimony of appellant's reputation without the same being put at issue by appellant. Mary Lou Lemon a state witness, had been asked by appellant for a date She refused stating, "I said I heard he didn't have too good of character references to be going out with at that time." (R.350) Appellant claims this testimony was admitted over defense counsel's objection. Mr Mitsunaga objected, *"with regard to anything he brother-in-law said to her,"* (R.350) on grounds of hear say; there was no objection made as to what *she said to appellant.* Contrary to what defense urges, counse did not object to the state's witness telling what she said to appellant.

The issue as to what Mary Lou Lemon said to the defendant was not objected to and preserved in the trial court and therefore cannot be considered on appeal.

Respondent would further argue that if there was error, it was not significant error. The prosecution by questioning the witness had reference to her telephone conversation with appellant and was not trying to establish appellant's alleged bad character, but was trying to establish appellant's state of mind prior to the shooting. *State v. Sanchez*, 11 Utah 2d 429, 361 P.2d 174 (1961).

POINT IV

THE APPELLATE COURT IS NOT REQUIRED TO AND MAY NOT PASS ON QUESTIONS NOT PRESENTED BY THE RECORD, ALTHOUGH DECIDED BY THE TRIAL COURT.

The defense called Duane Brinkerhoff, who testified as to his conversation with appellant. The prosecution objected on grounds that it was self-serving and there was no proper foundation. Prosecution then requested a proffer of proof. (R.487) The court, after hearing the proffer, sustained the objection on the ground that the court considered it hearsay. (R.488)

The proffer of proof was not made part of the record. It is impossible to determine whether the trial court committed prejudicial error in sustaining the

prosecutor's objection. The defense must preserve it own record. Respondent would submit that the appellate court is not required to and may not pass on questions not presented by the record, although decided by the trial court. 4 Am Jur 2d § 491.

The Utah Supreme Court in *State v. Cooper,* 11 Utah 531, 201 P.2d 764 (1949), stated:

> Defendant also asserts that the trial court erred in denying a motion for new trial on the grounds that the prosecuting attorney, in his argument to the jury, made improper and prejudicial statements. The arguments to the jury by counsel are not preserved in the record, and hence we cannot know what arguments were made, and cannot say that the trial court abused its discretion in denying a motion for new trial on this ground. In the recent case of *Schlatter v. McCarthy,* 113 Utah 543, 196 P.2d 968, 975 we said:
>
> > "Since the arguments of counsel were not preserved in the record, we are hardly in a position to say that the argument of plaintiff's counsel to the jury was improper, and grounds for reversal. Error will not be presumed, nor can we presume misconduct on the part of counsel. * * * There is nothing in the record before us on which this court could hold counsel guilty of improper conduct."

The court re-affirmed this rule most recently in *State v. Rogers,* 21 Utah 2d ...., ... P.2d .... (1968).

CONCLUSION

The facts in the instant case amply demonstrate that the trial court acted properly in finding appellant guilty of the crime charged. The legal claims of error on which appellant relies for reversal are wholly without merit.

The judgment of the trial court should be affirmed.

Respectfully submitted,

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